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Maureen D. Smith
(Of Counsel)

February 12, 2009

Via U.S. Mail

Thomas S. Burack, Chairman
NH Site Evaluation Committee
c/o NH Department of Environmental Services
29 Hazen Drive, P.O. Box 95
Concord, NH 03302-0095

***Re: Docket No. 2008-04 - Application of Granite Reliable Power,
LLC for a Certificate of Site and Facility for the Granite Reliable
Power Wind Park in Coos County***

Dear Chairman Burack:

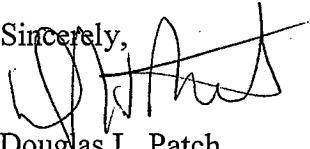
Enclosed for filing with the Site Evaluation Committee in the above-captioned matter please find an original and 9 copies of the "Applicant's Contested Motion to Strike Prefiled Testimony of Will Staats and Jillian Kelly on behalf of the New Hampshire Fish and Game Department" and an original and 9 copies of the "Applicant's Contested Motion *In Limine* Regarding Testimony, Comments, Reports and Any Other Evidence Concerning Matters Relating to the Provisions of RSA 212-A".

The Applicant respectfully requests that orders on these motions be issued as soon as possible after the 10 day objection period contained in N.H. Admin. Rule Site 202.14 (f) has run. A prompt ruling on these motions will promote the orderly conduct of the proceedings as it will provide guidance to the subcommittee members and the parties on the scope of the adjudicative hearings and therefore will enable everyone to prepare for the hearings accordingly.

Thank you for your assistance and cooperation. Please let me know if you have any questions.

Thomas S. Burack, Chairman
February 12, 2009
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Sincerely,



Douglas L. Patch

cc. Service List
Enclosures
537232_1.DOC

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2008-04

**RE: APPLICATION OF GRANITE RELIABLE POWER, LLC
FOR A CERTIFICATE OF SITE AND FACILITY
TO CONSTRUCT AND OPERATE
THE GRANITE RELIABLE POWER WINDPARK**

**APPLICANT'S CONTESTED MOTION *IN LIMINE* REGARDING TESTIMONY,
COMMENTS, REPORTS AND ANY OTHER EVIDENCE
CONCERNING MATTERS RELATING TO THE PROVISIONS OF
RSA 212-A**

NOW COMES Granite Reliable Power, LLC ("GRP" or "the Applicant"), by and through its undersigned attorneys, and respectfully moves that the New Hampshire Site Evaluation Committee ("Committee" or "SEC") issue a ruling *in limine* to exclude from the record in the above-captioned matter all testimony, comments, reports and any other evidence concerning matters relating to the provisions of RSA 212-A ("Endangered Species Conservation Act"). In support of this Motion, the Applicant states as follows:

1. RSA 212-A:13, III. states : "The provisions of RSA 212-A or any rule promulgated under this chapter shall not interfere **in any way** with the siting or construction of any bulk power facility or any energy facility as defined in RSA 162-H:2." (Emphasis added.)
2. On December 19, 2008, the New Hampshire Fish and Game Department, through Will Staats and Jillian Kelly, submitted prefiled testimony in the above-captioned matter. Said filing was made pursuant to RSA 212-A. *See letter from Carol B. Henderson to Thomas S. Burack, Chairman* (December 19, 2008) and *Testimony of Will Staats and Jillian Kelly on Behalf of the New Hampshire Department of Fish and Game* (December 19, 2008), p. 5, line 11. Fish

and Game's prefiled testimony asserts that the "Fish and Game Department is the sole state agency that has been tasked with the protection and management of the state's wildlife." *Id.*, p.5, lines 8-9. Among other things, Fish and Game's prefiled testimony asserts that the GRP project "will have an unreasonable adverse effect on the natural environment, in particular the high elevation forest ecosystem and the wildlife that rely on it." *Testimony of Will Staats and Jillian Kelly on Behalf of the New Hampshire Department of Fish and Game* (December 19, 2008), p. 19, lines 1-3.

3. On January 5, 2009, the Appalachian Mountain Club ("AMC") submitted prefiled testimony of Dr. David Publicover in the above-captioned matter. To a large extent, Dr. Publicover's prefiled testimony addresses the same issues raised by Fish and Game's prefiled testimony relative to the GRP project's impact on certain wildlife species and their habitat. Dr. Publicover's prefiled testimony opposes GRP's proposal to build wind energy turbines on Mount Kelsey and opposes the construction of the proposed Dixville Peak turbines unless such proposal is balanced "by a significantly improved mitigation package." *Testimony of Dr. David Publicover on Behalf of Appalachian Mountain Club* (January 5, 2009), p. 3.

4. On January 5, 2009, Public Counsel submitted prefiled testimony of Trevor Lloyd-Evans in the above-captioned matter. Mr. Lloyd-Evans' prefiled testimony references and "strongly supports" findings of the New Hampshire Fish and Game Department regarding the GRP project's anticipated impacts on Bicknell's thrush habitat and recommends a mitigation plan that removes proposed turbines to a lower elevation, "below the montane forest spruce/fir zone on at least the southern Kelsey Mountain area...". *Testimony of Trevor Lloyd-Evans on Behalf of Counsel for the Public*, December 2008, p. 7, lines 17-20 and p. 9, lines 1-3. Mr.

Lloyd-Evans' prefiled testimony also recommends a moratorium on the Applicant's construction activity from April 1 through August 1. *Id.* p. 9, lines 3-7.

5. On January 5, 2009, Public Counsel submitted the prefiled testimony of Dr. George M. Mariani in the above-captioned matter. Dr. Mariani's prefiled testimony, among other things, cites the GRP project's "potential impacts to State and Federal threatened high elevation species (eg. (sic) American marten, Bicknells Thrush, American three-toed woodpecker)" and indicates that a more thorough alternatives analysis that avoids loss of high elevation habitat should be required of the Applicant. *Testimony of Dr. George M. Mariani on Behalf of the Counsel for the Public* (December 2008), p. 7, lines 16-19.

6. The above-referenced prefiled testimonies include statements and conclusions concerning species that the Fish and Game Department has listed pursuant to RSA 212-A:6, IV (a) as either endangered or threatened. These species are the American marten, the American three-toed woodpecker, and the Canada Lynx. *See* N.H. Admin. Rules Fis. 1000.01, 1000.02. The prefiled testimonies also include statements and conclusions concerning Bicknell's Thrush, a bird species which is not listed as an endangered or threatened species under RSA 212-A, but is listed as a "species of special concern" in the New Hampshire Wildlife Action Plan, a document appearing on the Fish and Game Department's website and which was produced by Fish and Game (and others), consistent with Fish and Game's authority under RSA 212-A:5, I. to develop conservation programs relative to "wildlife species deemed in need of conservation".

7. GRP's application in the above-captioned docket concerns the construction and operation of a renewable energy facility as defined in RSA 162:H-2, XII. As such, the GRP project clearly meets the standard of "*any* energy facility" set out in RSA 212-A:13, III. (Emphasis added.)

8. RSA 212-A:13, III. requires that the entirety of RSA 212-A (a broad statute dealing with wildlife, threatened and endangered species) and the rules promulgated thereunder shall not "interfere in any way with" the construction or operation of GRP's proposed energy facility. Although the Committee has a responsibility under RSA 162-H:16, IV.(c) to evaluate the GRP project's effect on the natural environment, it is apparent from a plain and literal reading of RSA 212-A:13, III., that the Legislature has carved out an exemption for matters arising under RSA 212-A. The provisions of RSA 212-A:13, III. may be reasonably construed as manifesting the Legislature's intent to insure that nothing in RSA 212-A or the rules promulgated thereunder interfere, in any way, with the siting of an energy facility under RSA 162-H. Thus, introduction of or reliance on any evidence concerning species listed under RSA 212-A, protections established by the statute, and conservation programs, investigations or any other matter conducted or arising under the auspices of RSA 212-A, is forbidden in the SEC process.

9. Given that the prefiled testimony referenced above contains information, comments and recommendations that are adverse to GRP's application, they interfere with the construction and operation of an energy facility and therefore, under RSA 212-A:13, III. those prefiled testimonies must be excluded from the record of these proceedings. In addition, the prohibition enunciated in RSA 212-A:13, III. must be applied to all prefiled testimony, public comments, reports or any other evidence relating to the provisions of RSA 212-A, rules promulgated under that statute and any actions taken pursuant thereto. In the alternative, even if such information is not excluded from the record of these proceedings, the Committee may not rely on that information to take any action (e.g. denying the application or imposing any

certificate conditions addressing issues relating to RSA 212-A) that would interfere, in any way, with the construction or operation of the proposed GRP energy facility.

10. Under RSA 541-A:33, II., the presiding officer may exclude irrelevant and immaterial evidence. Since RSA 212-A:13, III. operates to render the above-referenced information irrelevant and immaterial as a matter of law, it must be excluded from the record of these proceedings.

11. Pursuant to N.H. Admin. Rule Site 202.14 (d) and (e), on February 11, 2009, the undersigned forwarded a draft copy of this motion by electronic mail to the parties in this proceeding in an effort to obtain concurrence with the relief sought herein. The following responses to the request for concurrence were received prior to the filing of the within motion: Ms. Lisa Linowes, on behalf of Industrial Wind Action Group, indicated that she does not support the motion as presented; Counsel for the Public, Senior Assistant Attorney General Peter Roth indicated that he does not concur with the motion; Assistant Attorney General Evan Mulholland, on behalf of the New Hampshire Fish and Game Department, indicated that he did not consent and will be filing an objection to the motion; Intervenor Kathlyn Keene indicated that she does not concur with the motion; and Dr. David Publicover, on behalf of Appalachian Mountain Club indicated that he does not concur with the motion. The remaining parties did not respond to the undersigned's electronic mail message prior to the filing of the within motion.

WHEREFORE, in view of the foregoing, the Applicant respectfully requests that this honorable Committee issue an order *in limine* which:

A. Finds that testimony, comments, reports and any other evidence concerning matters relating to the provisions of RSA 212-A is not admissible in this proceeding;

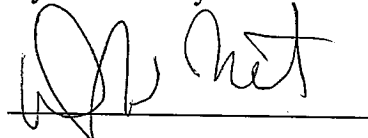
B. In the alternative, finds that the Committee may not rely in any way upon any testimony, reports, comments and any other evidence arising under or relating to the provisions of RSA 212-A; and

C. Grant such further relief as it deems appropriate.

Respectfully submitted,

Granite Reliable Power, LLC

By Its Attorneys

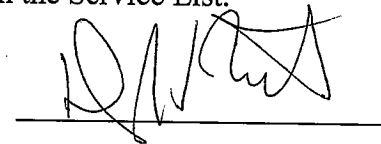


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Dated: February 12, 2009

Certificate of Service

I hereby certify that, on this 12th day of February, 2009, copies of the within Motion were sent by electronic mail or U.S. mail, postage prepaid, to persons on the Service List.


Douglas L. Patch